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Law And Spontaneous Order: Hayek's Contribution to Legal Theory

A. I. OGUS*

Ten years ago, I observed that the work of Friedrich von Hayek had been unjustifiably neglected by legal writers in this country.¹ Notwithstanding the impact and influence of New Right theorists in the period since then,² the situation has not altered significantly.³ This is all the more surprising because, particularly in his later works, Hayek addresses issues central to legal theory: the nature of law and the state, justice, constitutional structures, and the rival merits of common law and legislation.

Of course, Hayek's exploration of law has been, in no sense, a separate enterprise; rather, it is but one part of an overarching unified restatement of liberalism, having at its base a theory of knowledge and scientific inquiry, which is developed systematically first in relation to economic decision making and systems and then to the political order as a whole. In this paper I shall focus on Hayek's contribution to legal theory as expounded principally in his last major work *Law, Legislation and Liberty*⁴ but will attempt to place that in the context of his general theory of society, as it was developed throughout his intellectual career. After a short account of Hayek's approach to social science methodology, I show how he uses an epistemological theory to develop two models of social organization: spontaneous order, which he identifies with the market and with common law, and rational constructivism, which is associated with a planned economy and regulatory law. Hayek's main thesis is that it is only the first of these which, by preserving liberty subject only to universal rules of just conduct, can guarantee the progress of human civilization. I argue that the normative dimension of this assertion is fundamentally flawed but that, as an explanatory model of the development of law, Hayek's theory merits serious attention.

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This paper is the second in a series dealing with the work of theorists who have substantially influenced contemporary understanding of law and society. (See previously H. Collins, 'Roberto Unger and the Critical Legal Studies Movement' (1987) 13 *J. of Law and Society* 387.)

I. THE METHODS OF SOCIAL SCIENCE

Hayek's method of analysing society has its origin in the Kantian conception that individuals cannot observe phenomena 'externally'; the human mind is as much a part of the natural and social environment as that which is being studied.⁵ Social reality, then, cannot be 'explained' by an objective, intellectual process. The subjectivist theory was central to the Austrian school of economics, in which Hayek was trained and from which he derived much of his early inspiration.⁶ In contrast to the classical economists, the Austrians concluded that resources had no objective 'value', determinable by reference to, for example, labour and capital input. 'Value' was, instead, a matter of individual subjective preferences and choice. Hayek developed the notion in his own economic work⁷ but, more significantly, applied it to the whole of social sciences.⁸ Since the subject-matter of the latter was composed entirely of human action and interaction which was, in turn, the result of attitudes, beliefs, and motives, objective analysis was impossible and therefore 'scientistic':

Not only man's [*sic*] action towards external objects but also all the relations between men and all social institutions can be understood only in terms of what men think about them. Society as we know it is, as it were, built up from the concepts and ideas held by the people; and social phenomena can be recognized by us and have meaning to us only as they are reflected in the minds of men.⁹

How, then, is the social scientist to derive an understanding of society and social institutions? Hayek's answer is by means of a 'compositive' method: groups of structurally connected elements can be selected out of the totality of observed phenomena, revealing the regularities, pattern, or general order of human behaviour.¹⁰ A strict Austrian would argue that the complexity of variables inherent in human behaviour and motivation precludes the possibility. No doubt aware of the risk of undermining the importance of his own essay in prophesy (in the highly influential *Road to Freedom* he had spelt out what he saw as the implications for the future of current trends in political institutions),¹¹ Hayek in his later writing reached a different, and perhaps not entirely satisfactory, conclusion. While specific predictions about complex phenomena (such as the price of a particular product at a particular time) cannot be made, nevertheless a theory derived from observing broad patterns of behaviour under certain conditions may enable us to expect those patterns to recur if the conditions prevail – and in principle the hypothesis is testable, or at least falsifiable in the Popperian sense.¹² Hayek's sweeping generalizations about the human condition stand or fall with this methodological assumption; some would argue that its inherent vagueness makes it difficult to distinguish between scientific prediction and pure speculation.¹³

II. TWO MODELS OF SOCIAL ORGANIZATION

The anti-rationalist thrust of Hayek's approach to social science methodology applies to action as well as thought and is at the heart of his social theory.

Knowledge of the innumerable facts which make up the human condition is necessarily widely dispersed and fragmentary. Individuals making decisions about courses of action can at best rely on limited information normally pertaining to localized environments. Interaction and co-operation with others are, of course, essential, but this does not imply a planned or directive form of social organization. The *spontaneous order* which emerges is self-generating or endogenous:¹⁴ it is not deliberately brought about and has no explicit purpose; rather it results from the instinctive adoption of certain (often unformulated) rules. This idea of unplanned order is exemplified by the development of human language but also by animal life, for example in the insect societies of bees, ants, and termites.¹⁵

For society to exist, the rules must be habitually obeyed, but to overcome the Hobbesian dilemma which arises when self-interest conflicts with the common goal compulsion may be necessary:

Some such rules all individuals of a society will obey because of the similar manner in which their environment represents itself to their minds. Others they will follow spontaneously because they will be part of their common cultural tradition. But there will be still others which they must have to be made to obey, since, although it would be in the interests of each to disregard them, the overall order on which the success of their actions depends will arise only if these rules are generally followed.¹⁶

Although, therefore, representatives of the community might have to enforce the rules, under a spontaneous order their specific content is not to be designed. Because the relationship between individual rules and the overall order is so complex, no individual is able to predict what will or will not succeed. Rules are best left, by a process of evolutionary selection, to adapt to changes in the environment.

The spontaneous order model of social organization is to be contrasted with *rational constructivism* which assumes that human institutions are capable of serving human purposes, and in the past have successfully done so, only if they are deliberately designed.¹⁷ For Hayek, this view, which has infused social and political thought since Descartes, is deeply fallacious: it fails to recognize that the human mind is a part of, and therefore cannot transcend, spontaneous order; and it results from the synoptic delusion: 'the fiction that all the relevant facts are known to some one mind, and that it is possible to construct from this knowledge of the particulars a desirable social order'.¹⁸

1. *The Market as Spontaneous Order*

The earlier part of Hayek's career was devoted to pure economic theory¹⁹ – he held the Tooke Chair in Economic Science at London University from 1931 to 1950 – and his notion of spontaneous order was developed first in relation to the market.²⁰ The latter is an unplanned process whereby individuals make use of decentralized and fragmented knowledge, limited normally to localized information about prices and costs, to advance their own interests in competition with others. The basis of the competitive market order is, then, a system for communicating information: individuals respond to signals, the

prices which reflect peoples' needs for products (demand), with profits rewarding those whose skill, or perhaps luck, enables them to adapt best to those signals. They need know nothing of why demand changes, still less of the economy as a whole. The 'marvel' of prices is: 'how little the individual participants need to know in order to be able to take the right action. In abbreviated form, by a kind of symbol, only the most essential information is passed on and passed on only to those concerned.'²¹

Planned economic systems fail simply because no individual, or set of individuals, can have the knowledge required to co-ordinate the activities of producers and consumers; and, in any event, economic progress is dependent on individuals being rewarded for successful experimentation with what is wholly or partially unknown.²²

While these ideas may be largely shared by neo-classical economists, Hayek diverges from their traditional theory by not relying on assumptions either of the perfect knowledge of economic actors, or of perfect competition. The phenomena of the market process are always in a state of flux. An individual entrepreneur may, for example, offer a new product, guessing from information about other products that there will be sufficient demand for it; if her or his guesswork is good, she or he will enjoy an initial monopoly power but, unless there are barriers to entry, that will not last. This view of the market as a dynamic process led Hayek to be highly critical of the neo-classical obsession with supply and demand equilibrium and allocative efficiency:²³ a model in which, responding to stable preferences, resources are assumed to gravitate towards such an equilibrium distorts the reality of economic behaviour, because there is an inherent tendency for agents, in the light of newly-acquired knowledge, to move away from this state. Since Hayek's approach does not lend itself to econometric modelling of the kind which now dominates the economics discipline, it is perhaps not surprising that his work is neglected by contemporary economists.²⁴

2. Common Law as Spontaneous Order

The germs of Hayek's identification of the common law with spontaneous order may be found in *The Road to Serfdom*²⁵ and *The Constitution of Liberty*²⁶ where he views 'genuine' law as possessing a generality and thus abstracted from particular circumstances of time and place. Further, and in sharp opposition to Austinian jurisprudence, 'law' is distinguished from 'command' in that it does not presuppose a sovereign who issues it; as such, it is a part of the unplanned order.

The subject is explored in considerable depth in *Law, Legislation and Liberty*, the larger part of the first volume being devoted to it.²⁷ Law-making is here portrayed as a continuous, adaptative process dealing with unforeseen consequences:

The parts of a legal system are not so much adjusted to each other according to a comprehensive overall view, as gradually adapted to each other by the successive application of general principles to particular problems – principles, that is, which are often not even explicitly known but merely implicit in the particular measures which are taken.²⁸

The individual judge functioning within this process is more an 'unwitting tool . . . than a conscious initiator'. The judge's task is to apply the general principles of law, not to question them. Stability ensues because, in applying the general to the particular, the judge will interpret it in such a way as to render it consistent with other general principles and thus generate coherence.²⁹

The principles themselves are 'universal rules of just conduct'.³⁰ This means, in the first place, that there is an equality before the law, in that particular groups within society are not the subject of specific prescription or specific dispensation. Secondly, the principles do not purport to provide a concrete solution to all the many (and unknowable) contingencies which may arise. Thirdly, they are purpose-independent; their application in particular instances is not designed to achieve particular social or economic ends. Rather, they reflect the practices which have evolved in the spontaneous order and, as such, should, in general, conform to the expectations which the parties would have 'reasonably formed because they corresponded to the practices on which the everyday conduct of the members of the group was based'.³¹ Granted, however, the fact that in an ever-changing environment some individuals will be exploiting new knowledge, it will be impossible (and inappropriate) to protect all expectations. The aim, then, is to *maximize* the possibility of expectations in general being fulfilled and, as we shall see, for Hayek this implies laying down for each individual a range of permitted actions (liberty) by designating ranges of objects over which the individual has control and rights of disposal (property).³²

Legislation is frequently, though not always, used as an instrument of rational constructivism. It performs this function when it lays down rules designed to achieve particular ends or supplements positive orders that something should be done, or creates, or confers powers on, an agency for this purpose.³³ Hayek is here referring to what we would call regulatory law,³⁴ though confusingly he uses the term 'public law', thereby failing to appreciate that part of public law, for example that governing judicial review of administrative action, contains 'universal rules of just conduct'. In contrast to the rules evolving under spontaneous order, regulatory measures are purpose-specific, often by means of targeting rules (or exemptions from rules) on specific groups, thus infringing equality before the law, and typically attempting to lay down a comprehensive set of solutions for all foreseeable contingencies, impliedly assuming omniscience in the sovereign ruler.

Hayek's concern to identify law under the spontaneous order with the common law does not, however, lead him to the position that legislation should be dispensed with altogether.³⁵ Of course, statute law may, in part, be a codification of the principles of private law which have evolved through judicial decisions.³⁶ More than this, Hayek recognizes that legislation may be necessary to correct judge-made law where the latter is too slow to adapt to wholly new circumstances; this can occur because developments cannot be reversed if judges are not to disappoint reasonable expectations created by earlier decisions. Most significantly of all, in a passage which is frequently

overlooked, he concedes that judicial error, and therefore the need for legislation, may result from the fact that 'the development of the law has lain in the hands of members of a particular class whose traditional views made them regard as just what could not meet the more general requirement of justice'; and he instances labour law, landlord and tenant law, and creditor/debtor law as fields where judges were drawn almost exclusively from the class of one of the interested groups.³⁷

III. BLUEPRINT FOR THE 'GREAT SOCIETY'

As we have seen, Hayek's approach to social science, while preventing him from formulating specific predictions about human behaviour by inductive or deductive means, nevertheless enables him to make broad generalizations, derived from observations of 'patterns' of events. The main thesis of *Law, Legislation and Liberty* involves such a generalization:

... that a condition of liberty in which all are allowed to use their knowledge for their purposes, restrained only by rules of just conduct of universal application, is likely to produce for them the best conditions for achieving their aims; and that such a system is likely to be achieved and maintained only if all authority, including that of the majority of the people, is limited in the exercise of coercive power by general principles to which the community has committed itself.³⁸

Hayek's blueprint for the Great Society³⁹ is drawn, of course, from the spontaneous order model. Its constituent parts now call for examination.

1. *Liberty*

Liberty is not viewed by Hayek as an end in itself, but as the means to an end – human progress.⁴⁰ Whether or not civilization is 'better' as a result of increased wealth, there is an overwhelming demand for material progress of this kind and it cannot be achieved without liberty. For social progress, each individual should be able to act on her or his own particular knowledge for her or his own particular purpose. Since there is inevitable ignorance as to many of the factors on which the pursuit of individual purposes rests, 'liberty is essential in order to leave room for the unforeseeable and unpredictable'.⁴¹ The goal should be the maximization of opportunities for individuals to learn of facts hitherto unknown, even though, of course, this involves the risk of failure as well as of success.

The concept of liberty employed here is, it should be noted, a restricted one.⁴² It means freedom from coercion by others but does not extend to freedom in the political sense of people participating in the choice of government. It insists that individuals have some private sphere protected against interference by others, but this does not imply that society is to guarantee that each individual has access to a minimum amount of resources. In this respect Hayek differs from those libertarians who argue that some material support for disadvantaged persons may be necessary if they are to

exercise political rights.⁴³ It is true that he accepts as inevitable government action to deal with extremes of poverty but the justification is not 'liberty', still less 'citizenship'; rather it is in the interests of those 'who require protection against acts of desperation on the part of the needy'⁴⁴ – an explanation which is more fully explored in Marxist analysis.⁴⁵ The essence of the 'private sphere', therefore, is not the possession of property ('freedom may be enjoyed by a person with practically no property of his own'⁴⁶) but the right to use assets which are possessed, for which purpose freedom and enforceability of contracts are vital. Assets are acquired as rewards for merit, as determined by the market. Inheritance is defended simply because it arises from the natural instincts of parents and if it is prevented those instincts will manifest themselves in less attractive ways, for example nepotism and corruption.⁴⁷ It follows that Hayek accepts historical patterns of entitlements as a given and makes no attempt, in the manner of Nozick,⁴⁸ to justify them.

Clearly there must be some exceptions to freedom from coercion. We have already seen that compulsion to obey the rules of the spontaneous order, the common law, is necessary. Defence of a society against external enemies is another uncontroversial justification for governmental control. But it may come as a surprise to Hayek's critics to learn that he is, by no means, an advocate of the 'minimal state' and that there is a wide range of regulatory measures that he is prepared to tolerate.⁴⁹ Most cases arise as a result of market failure, notably externalities, that is, where some of the adverse or beneficial consequences of an activity are not reflected in the prices which agents charge, thus leading to an overproduction, or underproduction, of the activity in question.⁵⁰ It is on this ground that he rationalizes, for example, centralized provision of roads⁵¹ and the public financing of education. More generally, since information is a commodity not easily supplied by the market but facilitates the working of that process, he recognizes the appropriateness of building regulations, pure food law, the certification of certain professions, and some safety and health regulations – intervention of this kind 'certainly assists intelligent choice and sometimes may be indispensable for it'.⁵²

Nevertheless, he is quick to point out important limitations. First, while regulatory legislation inevitably involves some departure from the ideal of universal rules of conduct, to mitigate the evil certain general requirements of justice, such as the avoidance of arbitrary discrimination, ought to be observed. Secondly, though the public financing of some services may be justified, it does not follow that government should necessarily itself provide them – hence the argument for publicly funded education vouchers valid for private institutions. In short, it should be recognized that the adoption of collective measures involves resorting to an inferior method of provision and the spontaneous mechanism of the market should be relied on as much as possible.⁵³

2. *The Rule of Law*

A continual theme in Hayek's work from *Road to Serfdom* through to *Law, Legislation and Liberty* has been that liberty is not a natural state but is rather

created and preserved by the 'rule of law'. The latter mirrors closely the concept familiar from Dicey's work⁵⁴ and asserts as meta-legal requirements that laws should be universal, known and certain, and should apply equally to all.⁵⁵ Viewed as such, the rule of law has suffered a marked decline in the twentieth century. The original concept of *Rechtsstaat*, a product of the liberal movement, which demanded subservience of the state to the meta-legal principles of the rule of law was displaced by a purely formal interpretation which required only that all state action be authorized by the legislature. Hayek is ruthless in his criticism of developments in legal thought which he considers contributed to this decline: the overwhelming success of legal positivism – 'the "pure theory of law" . . . expounded by Professor H. Kelsen signalled the definite eclipse of all traditions of limited government';⁵⁶ the violent attacks on the certainty of law by Jerome Frank – 'it was the young men brought up on such ideas who because the ready instruments of the paternalist policies of the New Deal';⁵⁷ and the literature outlining an antirule-of-law doctrine promulgated by a group of 'socialist lawyers and political scientists' including Ivor Jennings and W. A. Robson.⁵⁸

For Hayek, the institutions and practices of the administrative/welfare state infringe the meta-legal principles in several important respects. Collectivist economic measures cannot be accommodated to general principles which prevent arbitrariness:

The planning authority . . . must provide for the actual needs of people as they arise and then choose deliberately between them. It must constantly decide questions which cannot be answered by formal principles only, and in making these decisions it must set up distinctions of merit between the needs of different people.⁵⁹

In making these decisions, the authority and its subordinate agents must inevitably possess and exercise considerable discretionary powers. The rule of law would insist that such discretion be constrained by a system of administrative law which enables the judiciary to review the substance of the action by reference to general principles; but the courts' concern is, in general, limited to the question whether the particular action was formally authorized by legislation.⁶⁰

These arguments familiar to, and much debated by, administrative lawyers do not call for detailed consideration here; suffice it to observe that Hayek would probably find unpersuasive the view that the principles of judicial review developed in our legal system – particularly the '*Wednesbury*'⁶¹ principle of reasonableness – fit his model,⁶² and would be even more hostile to the opinion which casts doubt on the alleged superior wisdom of the ordinary courts and, therefore, on extensive judicial activism.⁶³

3. *Constitutional Constraints*

The need to impose constraints on government action arises not merely because such action inevitably infringes the meta-legal principles of the rule of law. As Hayek has argued in his later work, it is a consequence also of the weaknesses of traditional democratic structures. If, as we have seen,⁶⁴ power

must be conferred on representatives of the community in order to avoid the Hobbesian dilemma created by conflicts of self-interest, it does not follow that the existence of democratic institutions representing majority opinion is able to solve that dilemma. Given the unlimited power of legislative bodies to enact regulatory measures conferring benefits on particular groups, a government commanding the majority of votes in those bodies will need to offer such measures to those on whose support it relies. Groups with common interests will, then, co-ordinate and organize themselves to demand benefits. Thus:

... in the course of this century an enormous and exceedingly wasteful apparatus of para-government has grown up, consisting of trade associations, trades unions and professional organizations, designed primarily to divert as much as possible of the stream of governmental favour to their members.⁶⁵

The concept of parliamentary sovereignty, particularly the Westminster model, is the root cause of the problem. The classical theory of representative government took the wrong direction: the equal claims of democratic government and democratic legislation led to a situation in which the powers of the two branches were effectively combined and to a revival of the 'monstrous' establishment of an absolute power not restricted by any rules.⁶⁶ Democracy in this form is a sham; it is 'increasingly becoming the name for the very process of vote-buying, for placating and remunerating those special interests which in more naive times were described as the "sinister interests"'.⁶⁷

At the same time as Hayek was formulating these ideas, a highly sophisticated and influential version of them was being developed by the public choice school of economics.⁶⁸ Because most of this analysis is predictive – what consequences flow from different institutional arrangements – the economists involved have tended to fight shy of adumbrating reform proposals. Hayek is not so cautious. In the third volume of *Law, Legislation and Liberty* he outlines an ideal constitution which, in his view, would solve the problems.⁶⁹ The key to his model is the establishment of two representative bodies with different functions. The Legislative Assembly would be charged with maintaining and developing 'proper' law which, throughout this work, Hayek identifies with spontaneous order, that is the universal rules of just conduct. As such, its role would be sharply contrasted with that of the Government Assembly which would be concerned with organizing the apparatus of government and making decisions about the use of resources entrusted to the government. Crucially, the second body would be bound by the rules of just conduct laid down by the first, so that it could not issue any orders to private citizens which did not follow 'directly and necessarily' from the rules emanating from the latter.⁷⁰ Consistently with the theory of spontaneous order that the rules of just conduct should be purpose-independent, they should be determined by opinion (what is right or wrong) and not by interests. To achieve this, it is obviously desirable that the members of the Legislative Assembly should be insulated from the demands of pressure groups. Hayek therefore suggests that they should be elected for long periods, for example fifteen years. After this period, they would not be eligible for re-election, nor indeed forced to earn a living in the market; rather, they would be

assured of continuous public employment as lay judges. To reflect contemporary standards of right and wrong, the members would be elected by all persons in the community of the same age, say forty-five years old. Finally, a constitutional court would be entrusted with the task of resolving disputes about the proper competence of each of the two assemblies and, to preserve independence from government, its judges would be elected by a committee of former members of the Legislative Assembly.

4. *Justice*

If, for Hayek, law properly so called comprises 'universal rules of just conduct', such as evolve through common law decisions or, in his ideal constitution, by the Legislative Assembly, what is their content? What makes them 'right' or 'wrong'? What is 'justice'? Since justice is a part of the constantly evolving spontaneous order, we cannot expect, and certainly do not receive, concretized answers to these questions; to provide such would smack of rational constructivism. In the second volume of *Law, Legislation and Liberty*, appropriately titled *The Mirage of Social Justice*, Hayek therefore concentrates on how just rules should be 'discovered' and what is *not* 'justice'.

The rules of just conduct are abstract guides to behaviour in a world in which most of the particulars are unknown.⁷¹ They command general assent since they correspond to general usage. Internal consistency and application over a reasonably long period are important qualities, because they become the basis of planning by individuals. The function of the rules is to protect ascertainable domains within which the individual is free to act, rather than to determine particular courses of action; consequently, they are typically negative in character.⁷² Likewise, since knowledge of the importance of particular ends for particular individuals is lacking, the test of justice is also negative:

... justice is ... emphatically not a balancing of particular interests at stake in a concrete case, or even of the interests of determinable classes of persons, nor does it aim at bringing about a particular state of affairs which is regarded as just.⁷³

Utilitarian evaluations are therefore dismissed as being constructivist fallacies.⁷⁴

Hayek would prefer his concept of justice not to be identified with 'natural law', which as typically used denotes some deontological theory.⁷⁵ Nevertheless, the manner in which the rules, and notions of justice, develop is the result of a 'natural' process, in the anti-positivist sense of that being independent of deliberate choice by sovereign wills: it is 'natural selection' through evolution which determines the success and the justice of the rules. (I shall return to this crucial proposition in the next section of the paper.)

Only human conduct, and that which affects others, can be considered just or unjust. The action of governments and other organizations can be so qualified but not the order (or situation) of society as a whole since, in terms of Hayek's theory, a state of affairs, the particulars of a spontaneous order, cannot be the intended aim of individual actions.⁷⁶ This leads to the

enormously important, and also highly controversial, rejection of concepts of social, or distributive, justice:

'[S]ocial justice' will ultimately be recognized as a will-o'-the-wisp which has lured men to abandon many of the values which in the past have inspired the development of civilization.⁷⁷

For Hayek, the term has no meaning except under systems where rulers arrogate to themselves power to determine the impossible – what is good – and in which individuals are ordered what to do. In a social order under which people are free to experiment by extending knowledge and thereby enabling improvements to be made to the general wealth of all, the inevitable price is that individuals and groups risk unmerited failure. To replace a system of rewards determined by the market would halt progress. Further, 'rational constructivist' attempts to distribute resources on the basis of 'justice' are doomed to failure because we lack objective criteria for determining and comparing 'merit' or 'need'. As the failure of medieval systems to locate just prices and just wages reveals, 'value to society' is immeasurable except by market methods; nor can the need of one individual, for example, to decent housing, be compared with that of another, for example, to relief from pain. Decisions on such matters inevitably lead to arbitrariness. They also result in infringement of the universal rules of just conduct since people would be treated differently according to their apparent material situation:

The distributive justice at which socialism aims is thus irreconcilable with the rule of law, and with that freedom under the law which the rule of law is intended to secure.⁷⁸

IV. CRITIQUE: THE NORMATIVE DIMENSION

1. *The Problem of Values and Evolution*

In my account of Hayek's work I have attempted to show how he develops his evaluative framework for social institutions, and hence also his highly critical judgements of some forms of social and political arrangements, from an epistemological base. What is good for mankind cannot be known and rational plans for the future cannot be made; institutions should therefore be appraised in terms of their capacity to foster explorations into the unknown and to disseminate the findings. But a crucial question is raised as to the normative content of this theory. It is through addressing this question that we can locate what I believe to be the fundamental weaknesses in Hayek's work.

Hayek argues that the spontaneous order is value-neutral. Values are a product of, and may be altered by, evolutionary processes:

It is not only in his knowledge, but also in his aims and values that man is the creature of civilization; in the last resort, it is the relevance of these individual wishes to the perpetuation of the group or the species that will determine whether they will persist or change.⁷⁹

What is 'good' or 'bad' is thus a question of what proves to be effective in terms of survival. Within any given society there will be competition between different groups and individuals with different sets of aims and values:

Whether a group will prosper or be extinguished depends as much on the ethical code it obeys, or the ideals of beauty or well-being that guide it, as on the degree to which it has learned to satisfy its material needs.⁸⁰

Cultural development is thus seen as involving conflicts of norms, with natural selection operating to resolve the conflicts.

This Darwinian approach is paralleled by the current fashion to apply socio-biological models of evolution to legal and economic institutions⁸¹ and by the well-known thesis of Priest,⁸² among others, that the litigation process generates a natural tendency for common law rules to evolve towards efficiency, as those disadvantaged by inefficient rules will have the incentive to challenge them until they are overturned.⁸³ These other exponents of evolutionary models typically use them as explanatory or descriptive devices. In contrast, Hayek's central purpose is to argue that the liberty inherent in spontaneous order *should* be preserved by the universal rules of just conduct which constitute the rule of law. Clearly this proposition has a normative character and thus must be posited on some moral value, presumably that of liberty. But this opens the door to a number of powerful objections, which may be considered in increasing order of importance.

First, it has been argued that the rule of law, even under Hayek's own definition, 'universal rules of just conduct', is compatible with a system that does not uphold liberty but rather permits highly oppressive policies.⁸⁴ This objection may perhaps be overridden if, as has been suggested, the test of 'universalizability' implies not merely a consistency of treatment between similar cases but also that the rules should be impartial as to the interests and preferences of all concerned.⁸⁵ Secondly, liberty cannot stand by itself as the sole moral value being invoked. Hayek, it will be recalled, regards liberty as essential for the progress of civilization. Inevitably, he postulates as a goal the maximizing of the welfare of mankind as a whole,⁸⁶ thus rendering himself vulnerable to the many well-known criticisms of utilitarianism.⁸⁷ Thirdly, the implicit notion that rules are morally appropriate simply because they are the result of undesigned evolutionary processes is, to say the least, extremely dubious.⁸⁸ Survival is no test of moral worth and the theory can be used to justify any set of rules which develop over time. In so far as the evolutionary-utilitarian criterion is identified with the capacity to sustain the maximum human population, it leads to the absurd proposition that the system which can support the largest population is also the best.⁸⁹ The outcome of competition between groups with different sets of aims and interests may be determined by accident, local factors, and also less morally-neutral conditions, such as the exploitation of power or use of force;⁹⁰ and, were it otherwise, how can the considerable differences between the rules operating in differing societies be explained? Given these difficulties, it would seem that

Hayek, if he wishes to adhere to his 'Blueprint for the Great Society', is forced to argue for the 'rational' adoption of his ideal order, a course of action which he would, of course, wholeheartedly have to condemn as being itself 'rational constructivism'.⁹¹

2. Social Justice and Universal Rules of Just Conduct

Many – I count myself among them – must find morally offensive Hayek's rejection of any notion of social, or distributional, justice⁹² and the arguments he marshals in support of the thesis are not his strongest. The proposition that 'justice' can apply only to human conduct (and not states of affairs) would seem to be a semantic one, because it rests on his own definition of justice which does not accord with common usage.⁹³ The fact that it may not be possible objectively to determine need otherwise than according to the market criterion of ability to pay should not lead to the conclusion that that method of allocation is necessarily more just. The prices that individuals are willing to pay are as much a reflection of their wealth position as of the intensity of their desire for the goods in question and, as such, constitute an imperfect measure of social welfare. As Calabresi and Bobbitt have so eloquently demonstrated, allocation purely by reference to the market method may be acceptable for washing powders but is intolerable for the 'tragic choices' forced on society by the scarcity of some resources, for example kidney machines;⁹⁴ and perhaps the argument holds for many choices which are less than tragic. In a moral, if not a formal, sense market-based decisions on such resources are as arbitrary as those grounded in other criteria.

Even if we were to accede to Hayek's meta-legal requirement that legislation should accord with the 'universal rules of just conduct', it is far from clear why redistributive measures should be regarded as necessarily infringing those rules.⁹⁵ To prescribe that all citizens must be guaranteed access to a minimum amount of resources, sufficient to enable them to participate actively in the community or that all those with income above a certain threshold should pay taxes would seem to be no less 'universal' than to insist that all occupiers of premises owe a common duty to lawful visitors to see that they are reasonably safe in using the premises.⁹⁶ There is an evident difficulty in reaching firm conclusions on this matter simply because Hayek is vague on the degree of generality required for his universal rules and, indeed, is loth even to offer examples.⁹⁷ But, from an historical perspective, one may legitimately inquire how the principles of common law could properly satisfy the test of 'equality' when in practice they were formulated in relation only to the claims of individuals who had the means and willingness to take legal proceedings in the higher courts. Conversely, as in more recent times access to those courts has been facilitated by legal aid and other developments, judges have clearly allowed distributional goals to influence the formulation of general principles, for example, the broadening of tort liability to accord with loss-distributing techniques such as insurance⁹⁸ and the attempts to modify contract obligations in the light of fairness considerations.⁹⁹

Hayek's unqualified preference for general judicial principles provokes more criticism. These principles are, of course, intended to foster economic growth by meeting the parties' reasonable expectations but the very unpredictability of the application of a general principle to specific facts will often hinder planning which is so essential for that growth. It has been demonstrated that the economically optimal precision of rules typically requires a much greater degree of specificity than Hayek's model would allow.¹⁰⁰ More seriously, perhaps, in an age when fast-expanding technology poses immense threats to the environment and human welfare, universal rules of just conduct can hardly provide the protection which members of society will demand against uncontrolled experimentation.

V. CONCLUSION

For the reasons outlined in the last section, my conclusion is that the normative dimension of Hayek's work is untenable. As an explanatory model of the development of political and legal institutions, his epistemologically-based theory of spontaneous order, while weakened by a tendency to push arguments too far, represents an important contribution to our understanding of law and certainly does not deserve its neglect by legal theorists. The insistence on the limits to human knowledge and hence on the constrained ability 'rationally' to control behaviour, particularly by regulatory measures, provides a powerful antidote to the more optimistic views expressed by Weberians and others. We might not agree with the specific characteristics which Hayek attributes to the common law in his 'universal rules of just conduct', notably the undue focus on a restrictive notion of liberty, but these very assertions force us to reflect on, and explore further, the sets of values which give integrity to that law. Indeed, once liberated from the stranglehold resulting from that insistence on liberty, those retaining faith in regulatory systems of law should accept the challenge and attempt to articulate the principles and values around which such systems might plausibly cohere.

NOTES AND REFERENCES

- 1 A. I. Ogus, 'Economics, Liberty and the Common Law' (1980) 15 *J. Society of Public Teachers of Law* 55.
- 2 N. P. Barry, *The New Right* (1987).
- 3 The only leading legal theorist who appears to have grappled seriously with Hayek's writings is Professor Neil MacCormick. See, particularly, *Legal Right and Social Democracy* (1982), ch. 1 and 'Spontaneous Order and Rule of Law: Some Problems' (1986) 35 *Jahrbuch des Öffentlichen Rechts der Gegenwart* 1. The literature on Hayek of other disciples is, in contrast, voluminous: a useful bibliography is to be found in J. Gray, *Hayek on Liberty* (2nd ed. 1986) 210-49.
- 4 F. A. Hayek, three volumes: *Rules and Order* (1973); *The Mirage of Social Justice* (1976); and *The Political Order of a Free People* (1979).
- 5 Hayek, op. cit., n. 4 (1973), p. 17.

- 6 T. C. Taylor, *The Fundamentals of Austrian Economics* (2nd ed. 1980).
- 7 For example, 'Economics and Knowledge' (1937) 4 *Economica* 33, reprinted in F. A. Hayek, *Individualism and Economic Order* (1949) ch. 2.
- 8 F. A. Hayek, *The Counter-Revolution of Science* (1952).
- 9 id., pp. 34-5.
- 10 id., p. 39.
- 11 'Although history never quite repeats itself, . . . we can in a measure learn from the past to avoid a repetition of the same process': F. A. Hayek, *The Road to Serfdom* (1944) 1.
- 12 F. A. Hayek, *Studies in Philosophy, Politics and Economics* (1967) 17, 28.
- 13 cf. E. Butler, *Hayek* (1983) 147.
- 14 Hayek, op. cit., n. 4 (1973), ch. 2.
- 15 Hayek, op. cit., n. 12, p. 69.
- 16 Hayek, op. cit., n. 4 (1973), p. 45.
- 17 Hayek, op. cit., n. 12, ch. 5; op. cit., n. 4 (1973) ch. 1.
- 18 Hayek, op. cit., n. 4 (1973), p. 14.
- 19 His major pre-war publications were: *Prices and Production* (1931); *Monetary Theory and the Trade Cycle* (1933); *Profits, Interest and Investment* (1939). I am not concerned in this paper with Hayek's anti-Keynesian work on money, credit, and trade cycles; on this, see F. Machlup, 'Hayek's Contribution to Economics' in *Essays on Hayek*, ed. F. Machlup (1977) 19-33.
- 20 Hayek, op. cit., n. 7, chs. 2, 4; see also op. cit., n. 4 (1976), ch. 10.
- 21 Hayek, op. cit., n. 7, p. 86.
- 22 id. chs. 7-9; Hayek, op. cit., n. 4 (1976), pp. 1-5.
- 23 Hayek, op. cit., n. 7, ch. 5.
- 24 J. Gray, 'Hayek, the Scottish School and Contemporary Economics' in *The Boundaries of Economics*, eds. G. C. Winston and R. F. Teichgraeber (1988) 66-8.
- 25 Hayek, op. cit., n. 11, p. 57.
- 26 F. A. Hayek, *The Constitution of Liberty* (1960) ch. 10.
- 27 Hayek, op. cit., n. 4 (1973), chs. 3-6.
- 28 id., p. 65.
- 29 There is an obvious parallel here with Dworkin's 'law as integrity' (R. M. Dworkin, *Law's Empire* (1986)), though under the latter, the Herculean judge is expected to interpret the general principles in the light of his perceptions of changing views of justice.
- 30 Hayek, op. cit., n. 4 (1973), p. 131.
- 31 id., pp. 96-7.
- 32 id., p. 107.
- 33 id., p. 125.
- 34 cf. Ogus, op. cit., n. 1, p. 56.
- 35 Using Hayekian arguments, this extreme position is taken in B. Leoni, *Freedom and the Law* (1961).
- 36 Hayek admits that legislation can increase the certainty of the law but 'this advantage is more than offset if its recognition leads to the requirement that *only* what has thus been expressed in statutes should have the force of law' [his italics]: op. cit., n. 4 (1973), p. 116.
- 37 id., p. 89.
- 38 id., p. 55.
- 39 Deliberately adopting this term, as used by Adam Smith, among others: cf. op. cit., n. 4 (1973), p. 138, n. 11.
- 40 Hayek, op. cit., n. 26, chs. 2-3.
- 41 id., p. 29.
- 42 id., pp. 11-13.
- 43 A. E. Buchanan, *Deriving Welfare Rights from Libertarian Rights* (1979). See also C. Bay, 'Hayek's Liberalism: The Constitution of Perpetual Privilege' (1971) 1 *Political Science Rev.* 110-23.
- 44 Hayek, op. cit., n. 26, p. 285: hence the case for compulsory social insurance.
- 45 V. George and P. Wilding, *Ideology and Social Welfare* (1976) ch. 5.

- 46 Hayek, op. cit., n. 26, p. 141.
- 47 id., p. 91.
- 48 R. Nozick, *Anarchy, State and Utopia* (1974).
- 49 Hayek, op. cit., n. 4 (1979), ch. 14.
- 50 cf. A. I. Ogus and C. Veljanovski, *Readings in the Economics of Law and Regulation* (1984) 64–5.
- 51 Except where, as in long-distance highways, tolls are practicable: Hayek, op. cit., n. 4 (1979), p. 44.
- 52 id., p. 62.
- 53 id., p. 46.
- 54 A. V. Dicey, *Law of the Constitution* (10th ed. 1961).
- 55 Hayek, op. cit., n. 11, ch. 6; Hayek, op. cit., n. 26, ch. 14.
- 56 Hayek, op. cit., n. 26, p. 238. For an extended criticism of Kelsen and legal positivism, see op. cit., n. 4 (1976), pp. 44–56.
- 57 Hayek, op. cit., n. 26, p. 247.
- 58 id., p. 241, referring, in particular to the former's *The Law and the Constitution* (1933) and the latter's *Justice and Administrative Law* (3rd ed. 1951).
- 59 Hayek, op. cit., n. 11, p. 55. See also op. cit., n. 26, pp. 227–8.
- 60 id., pp. 213–4.
- 61 *Associated Provincial Picture Houses Ltd. v Wednesbury Corp.* [1948] 1 K. B. 223.
- 62 H. W. R. Wade, *Administrative Law* (6th ed. 1988) 33–4 and ch. 12.
- 63 P. Craig, *Administrative Law* (1983) 30–1.
- 64 *Supra*.
- 65 Hayek, op. cit., n. 4 (1979), p. 13.
- 66 id., pp. 36–7.
- 67 id., p. 32.
- 68 Notably, J. M. Buchanan and G. Tullock, *The Calculus of Consent: Logical Foundations of a Constitutional Democracy* (1962) and J. M. Buchanan, *The Limits of Liberty: Between Anarchy and Leviathan* (1975). For a review of the literature, see D. C. Mueller, *Public Choice* (1979), and for its application to British institutions see R. C. O. Matthews (ed.), *Economy and Democracy* (1985).
- 69 Hayek, op. cit., n. 4 (1979), ch. 17. He is, however, reluctant to propose that a country with a 'firmly established constitutional tradition' should adopt his model: p. 107.
- 70 id., p. 119.
- 71 Hayek, op. cit., n. 4 (1976), p. 1.
- 72 Exceptionally, where individuals are placed in close community with others, positive duties may arise, the most prominent example being family law: op. cit., n. 4 (1976), p. 36.
- 73 id., p. 39.
- 74 id., pp. 17–23.
- 75 cf. J. M. Finnis, *Natural Law and Natural Rights* (1980).
- 76 Hayek, op. cit., n. 4 (1976), p. 33.
- 77 id., p. 67.
- 78 id., p. 86.
- 79 Hayek, op. cit., n. 26, p. 36.
- 80 id., p. 36.
- 81 See, generally, R. O. Zerbo (ed.), *Evolutionary Models in Economics and Law*; (1982) 4 *Research in Law and Economics*.
- 82 G. L. Priest, 'The Common Law Process and the Selection of Efficient Rules' (1977) 6 *J. Legal Studies* 65.
- 83 In an interesting extension to this theory, P. H. Rubin has argued that statute law will have a similar property, since under certain conditions those disadvantaged by inefficient rules may find it cheaper to lobby the legislature than to litigate: 'Common Law and Statute Law' (1982) 11 *L. Legal Studies* 205.
- 84 J. Raz, 'The Rule of Law and Its Virtues' (1977) 93 *Law Quarterly Rev.* 185.
- 85 Gray, op. cit., n. 3, pp. 61–8.

- 86 More specifically maximizing the chances of members of society to achieve unknown purposes: Hayek, *op. cit.*, n. 12, pp. 173–5. It should be noted that though Hayek describes utilitarianism as a ‘constructivist fallacy’ (*op. cit.*, n. 4 (1976), pp. 17–23), he is there referring to the use of hedonistic calculus to evaluate *particular* rules, rather than systems as a whole.
- 87 Usefully summarized in J. L. Coleman, *Markets, Morals and the Law* (1988) ch. 4.
- 88 cf. S. Gordon, ‘The Political Economy of F. A. Hayek’ (1981) 14 *Canadian J. Economics* 470.
- 89 Gray, *op. cit.*, n. 3, p. 141.
- 90 Bay, *op. cit.*, n. 43.
- 91 cf. McCormick, *op. cit.*, n. 3 (1986).
- 92 A reaction which he anticipated: *op. cit.*, n. 26, p. 306.
- 93 D. Miller, *Social Justice* (1976) 17–20.
- 94 G. Calabresi and P. Bobbitt, *Tragic Choices* (1978).
- 95 D. Miller, ‘Review of *Law, Legislation and Liberty*, vol. II: *The Mirage of Social Justice*’ (1977) 4 *Br. J. Law and Society* 142; McCormick, *op. cit.*, n. 3 (1986) p. 13.
- 96 Occupiers’ Liability Act 1957 s. 2.
- 97 Though at one point he notes that freedom of contract, inviolability of property, and the duty to compensate another for damage caused by fault invariably feature in contemporary systems of private law: *op. cit.*, n. 4 (1976), p. 40.
- 98 P. Cane, *Atiyah’s Accident Compensation and the Law* (4th ed. 1987) p. 234. For a striking example of distributional influences on negligence claims, see the recent House of Lords decision *Smith v Eric Bush* [1989] 2 All E.R. 514, where in formulating the duty owed by surveyors to house purchasers the judges draw a clear distinction between inexpensive houses and other property.
- 99 H. Collins, *The Law of Contract* (1986) ch. 9.
- 100 I. Ehrlich and R. Posner, ‘An Economic Analysis of Legal Rulemaking’ (1974) 3 *J. Legal Studies*; A. I. Ogus, ‘Quantitative Rules and Judicial Decision Making’ in *The Economic Approach to Law*, eds. P. Burrows and C. Veljanovski (1981) ch. 9.